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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 294

71-294

STATE OF NEW YORK,

Petitioner,

—against—

THOMAS ALFRED RUPPERT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinions challenged by this petition are two unanimous opinions of the New York Court of Appeals, the first is reported at 26 N.Y.2d 436 and the second at 29 N.Y.2d 519. The first is reprinted at p. 51 of the Petition for Certiorari and the second, at p. 75 of that petition.

The prior proceedings include three written opinions of the trial court (County Court of Westchester County, New York) which are unreported and are set forth in the petition at pp. 57, 61, 62.

After the reversal of the conviction by the Court of Appeals on May 13, 1970 there are two more opinions below, both unreported, one at the trial level (County Court of Westchester County) which appears on p. 81 of the petition. The order of the County Court (Judge George Beisheim, Jr.) dismissing the indictment and ordering the release of the respondent is reprinted in Exhibit A, *infra* p. 13. The other opinion, of the New York Supreme Court, Appellate Division, Second Department, appears at p. 77 of the petition.

Jurisdiction

The opinion of the Court of Appeals reversing the order of the Appellate Division and reinstating the order of the County Court which dismissed the indictment and ordered the release of the respondent was entered on June 9, 1971. The petition was filed within the 90 day period pursuant to 28 U.S.C. §1257(3).

Questions Presented

1. Whether the decision of the New York Court of Appeals in reversing the conviction of respondent for murder and arson applied the law to the facts on a substantial federal question in a way which does not accord with the applicable decisions of this Court. Necessarily embraced in this question are the questions whether:

a) The Court below properly applied the rule of *Miranda* v. *Arizona* (384 U.S. 436) and the long line of rulings from which *Miranda* followed when it excluded a confession to a third party (not a police

officer) because such confession was tainted by its connection to interrogation by the police who, concededly, gave the respondent no instruction or warning as to his constitutional rights.

b) Apart from *Miranda,* the interrogation of the respondent, a minor, by the police, by the aforementioned third party, and by the police and the third party together over a period of 33 days commencing with a 13-hour interrogation violated respondent's rights under the Fifth and Fourteenth Amendments.

Statutes Involved

The statutes and constitutional provisions are set forth in the Petition for Certiorari, pp. 3-5.

Statement of the Case

Petitioner seeks review by this Court of a decision of the Court of Appeals of New York which two times reviewed the record below. Upon its first review, that court unanimously reversed the conviction of a then seventeen-year-old youth on twenty-four counts of murder (for twelve deaths) and one count of arson first degree and called for a hearing by the trial court on the question of the admissibility of a confession by the respondent testified to by the third party at the trial. Upon reviewing the now enlarged record, the state's highest court again rendered a unanimous opinion, this time reversing the intermediate appellate court and reinstating the ruling of the trial court which had found the aforementioned confession inadmissible. The trial court had made that finding after a hearing that

developed a detailed, partly tape-recorded, chronicle of how the police and the third party had worked together to invent a series of inconsistent scenarios for the starting of the fire and to cajole and coerce the youth to confess them. On affidavit by the prosecution that it could offer no other competent evidence against the defendant-respondent, the trial court had dismissed the indictment. The Court of Appeals, in reinstating the suppression order and the dismissal of the indictment, ordered the release from prison of the now 22-year-old youth.

The petitioner-state prosecutor asks this Court to re-evaluate the evidence and reverse the New York Court of Appeals.

Petitioner relies on a 33-page fact statement which details the horrors of a sudden, calamitous fire on December 20, 1965 in the Jewish Community Center at Yonkers, New York, in which nine children and three adults perished. Omitted from the petitioner's chronicle is the sordid story, spread in the trial record, of the negligence of the Trustees of the Jewish Community Center, the architect, the workmen, and the director of the Center (the third-party witness to the defendant's confession), whose nonfeasance and misfeasance joined them all in responsibility for the tragedy. Nor is there any mention of the millions of dollars of law suits for negligence in the deaths of the twelve persons against the Trustees of the Center, the director, the City of Yonkers (which had failed to enforce its own safety and building standards in the course of the renovation of the Center that had supplied the principal incendiary materials for the fire), and the American Cyanamid Company (manufacturers of the polymethylmethacrylate decorative material used in the renovation, the semi-explo-

sive burning of which had evolved thousands of cubic feet of hot carbon monoxide gas that killed the fire's twelve victims almost instantly).

At the time of the fire, respondent was sixteen years old. At the age of nine, he had been adjudged a neglected child and had thereafter lived in foster homes and institutions until June of 1965 (six months before the fire) when he was released to his family's home. Respondent was employed as a youth worker at the Jewish Community Center.

The evidence adduced by the prosecution at the trial and as set forth, in part, in the petition, controverts the purported confession and shows that it would have been impossible for the respondent to have started the fire in the manner described in that confession as related to the jury by the director of the Center, the third party. Petitioner sets forth that confession as follows:

> "On the afternoon of the fire he [Ruppert] and Corsino [a fellow youth worker] had gone to the fourth floor to play with the pianos but they had been sent away by a violin teacher. At that point, the two separated. He [Ruppert] had what he described as an urge to set a fire, so he went down to the first basement paint closet [five floors below, at the diagonally opposite end of the building which measured 99 by 98 feet]. There he picked up an orange colored can three-quarters full of some smelly liquid which bore a red sign identifying the contents as highly flammable. [Evidence was adduced that such a can would weigh between 35 and 40 pounds] He took the elevator to the third floor and walked to the rear stairway and up to the fourth floor. He barricaded the hallway door

to avoid being interrupted and poured the liquid on a pair of two-by-fours, cartons, etc. which were on the stairs. Pouring as he went, he made his way to the third floor and into the balcony, where he poured the remaining liquid over the material stacked to the left of the doorway. He threw the can away and lit the fire. The size of the resulting blaze frightened him, so he went down to the gym where he again met Corsino." [Pet., pp. 10, 11]

Evidence recited by petitioner places respondent in the company of Andrew Corsino, a co-worker, all afternoon including the time, at 4:50 P.M., when they went to the fourth floor "to play with the pianos." Some minutes after 4:50 P.M. the youths separated on the fourth floor near the rear staircase, but were reunited in a matter of minutes or even seconds at 4:55 P.M. on the second floor [Pet., p. 23].

At 4:55 P.M., according to the prosecution's witnesses, two girls smelled smoke in the third-floor corridor outside the balcony of the auditorium where the fire was to rage within the next 10 minutes; they opened the balcony doors, looked in, and saw only smoke, no fire [Pet., pp. 14-15].

Manifestly, it was impossible for the respondent to have accomplished the olympic feat ascribed to him in the confession within the few moments when he was out of the company of Corsino. There was smoke and no fire in the balcony minutes after he was supposed to have been "frightened" by the "resulting blaze."

These facts, shown at the trial, are set against a record only at last revealed to public scrutiny subsequent to the trial at the hearing ordered by the Court of Appeals in

which hours of tape recordings made by the police during 33 days of hazing and questioning of the respondent were spread on the record.

The police in this undertaking joined with the director of the Jewish Community Center, to secure a confession from respondent. The director, who was to testify to the confession at the trial, ingratiated himself with Ruppert and postured as his friend. At the two hearings and at the trial, this witness also testified that he had believed Ruppert guilty and thought he should be arrested from the time of the first conversation he had had with him immediately after the fire when Ruppert told him "every time there is a fire, he is accused of it" [Pet., p. 52].

The record of the second hearing after the first reversal by the Court of Appeals shows plainly the impropriety of the methods by which the confession was secured. Tape recordings of interrogation of the respondent on five of the occasions he was questioned by the police and by the police and the third party jointly make up the bulk of this record. [December 22, 1965, (Exhibits 1, 4, 7, 8), December 28, 1965 (Exhibit 9), January 14, 1966 (Exhibit 11), January 19, 1966 (Exhibits 13, 16), and January 24, 1966 (Exhibit 18).] The record shows that these recordings represent only a portion of the persistent questioning, cajoling and threatening of the respondent over the days and weeks from December 22, 1965, to January 24, 1966. The sample is sufficient to establish the illegality of the process by which the police and the third party overwhelmed the will of a barely 17-year-old, susceptible youth to secure a confession and scapegoat for a community tragedy where civil blame would otherwise fall on at least one of the individuals soliciting the confession.

REASONS FOR DENYING THE WRIT

POINT I

The Court below did not decide a question of substance in a way which did not accord with the applicable decisions of this Court.

Miranda v. *Arizona,* 384 U.S. 436 decided on June 13, 1966, under the interpretation of this Court in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966), clearly applied to the case at bar, the trial of which commenced in April 1967. This was so found initially by the trial court, Judge Dempsey [Pet., p. 58], was accepted by the Court of Appeals in its first decision [Pet., p. 51] and thereafter became the law of the case [Pet., p. 83].

Nor does petitioner seriously maintain that the suppression of the co-called confession to the police by petitioner was not consistent with *Miranda.* Instead, petitioner argues [Point II, Pet., pp. 42-45] that since the interrogation of Ruppert took place before *Miranda* was decided, is it unfair to apply the ruling and besides, under the facts, the warnings were not "absolutely necessary."

Petitioner then is asking this Court to reverse itself on *Miranda* and to ignore the line of cases that led to *Miranda* i.e., *Spano* v. *New York,* 360 N.Y. 315 (1959); *Haynes* v. *Washington,* 373 U.S. 503 (1963); *Massiah* v. *United States,* 377 U.S. 201 (1964); *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). Petitioner is furthermore calling upon this Court to intervene in a State proceeding that has gone twice to the highest court of the State and has twice resulted in a unanimous opinion by the seven members of that court.

Moreover, the so-called confession to the third party acquired its indubitable taint not by reason of the doctrine of agency urged by petitioner [Point I, Pet., pp. 38-39] but by reason of the basic unfairness and illegality of the entire deceptive procedure applied by the police and by the police and the third party together in securing the confession from a susceptible youth. The taint that condemns the statements of the respondent recorded by the police is laid inescapably on the confession to the third party by the elementary consideration of timing. That confession was secured by the third party within minutes after the police had recorded a confession, and the confession to the third party was solicited and arranged for by the police to a degree that inextricably interrelates the two so-called confessions.

POINT II

Quite apart from *Miranda*, the deception, threatening and cajoling of the respondent, a minor, by the police and by the police and the third party jointly made any confession so secured inadmissible as involuntary under standards set by this Court. The confession was involuntary under the Fifth and Fourteenth Amendments to the Constitution.

This Court has held that to be voluntary, the confession must be the expression of free choice by one, who at the time he confesses, is in possession of mental freedom to confess or to deny a suspected participation in a crime or to refuse to answer. See *Lisbena* v. *California*, 314 U.S. 219 (1941). A confession is not voluntary if it is obtained by any sort of threat, by direct or implied promises, however slight, or by any exertion of improper influence such

as sympathy falsely induced. See *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Leyra* v. *Denno*, 347 U.S. 556 (1964); *Spano* v. *New York*, 360 U.S. 315 (1959).

This Court, further, scrutinizes carefully any contention that a confession secured from a minor is voluntary—particularly from a youth having psychological problems that might make him susceptible to influence by others. *Haley* v. *Ohio*, 332 U.S. 596 (1948); *Fikes* v. *Alabama*, 356 U.S. 560 (1958); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960); *Gallegos* v. *Nebraska*, 342 U.S. 55 (1951).

Moreover the record of the trial established the impossibility and improbability of the truth of the confession; while not found expressly by the court below, such conclusion is consistent with the dismissal of the indictment. See pp. 5 and 6 *supra*.

Petitioner emphasized that respondent was not in official police custody during the various interrogations because he was permitted to leave the police station and return to his home. A reading of the record, however, reveals the custodial circumstances of the succession of interrogations—excepting, perhaps, only the interrogation on the occasion when the police and the third party joined in deceiving the youth into thinking that he was appearing before a meeting of the Board of Directors of the Jewish Community Center. Again and again, throughout the record, the respondent expressed doubt and worry as to what his status was in relation to the police and as to what the police really did intend to do with him.

CONCLUSION

This case involves no important federal question wrongly decided. It has twice been reviewed thoroughly in the state process and the indictment has been dismissed at the trial level and by the state's highest court under the appropriate standards set by this Court.

The petition for certiorari should be denied.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Respondent

September, 1971

Exhibit A

COUNTY COURT

WESTCHESTER COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

THOMAS ALFRED RUPPERT,

Defendant.

Defendant Thomas Alfred Ruppert, through his counsel, Eleanor Jackson Piel, having moved to dismiss the indictment, and Carl Vergari, the District Attorney of Westchester County, through Assistant District Attorney James Duggan, having opposed said motion, and argument having been heard, Now it is

ORDERED that the indictment be and hereby is dismissed and the defendant released from custody, and it is further

ORDERED that the execution of this order is hereby stayed for seven (7) days from the date hereof.

GEORGE BEISHAM, JR.

Dated: October 16, 1970